

## The British ratification of the Underwater Heritage Convention: Problems and Prospects

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# THE BRITISH RATIFICATION OF THE UNDERWATER HERITAGE CONVENTION: PROBLEMS AND PROSPECTS

HAYLEY ROBERTS\*

The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 came into force in 2009, providing a much-needed international legal framework for the protection of underwater cultural heritage (UCH). This paper explores the reasons why the UK has neglected to ratify the Convention and why accession should now be prioritized. In doing so, the article reconciles the UK's stance with the agreement; moving the State into a position where it can reconsider ratification. In this context, it examines the definition of UCH and the purpose of the Convention, the extension of sovereign immunity for wrecked warships, and the likelihood of creeping coastal State jurisdiction beyond the competences conferred by the UN Convention on the Law of the Sea. This transformative analysis moves forward the debate on these issues and is of international significance to States that have been similarly hesitant to ratify the Convention until now.

## I. INTRODUCTION

For primarily technological reasons, historic shipwrecks have only relatively recently emerged as a distinct regulatory problem. It is just in the last 60 years, with the increase of SCUBA diving and related technology, that the need for a legislative framework to protect underwater cultural heritage (UCH) has become more prevalent. The discovery of a number of Spanish galleons in the 1970s brought about a new era of treasure hunters,<sup>1</sup> highlighting the increasing vulnerability of underwater heritage and raising the profile of 'commercial archaeology', where this new science was used to recover artefacts and sell them for profit.

The UN Convention on the Law of the Sea 1982 (UNCLOS)<sup>2</sup> was drafted to codify and develop international law relating to the sea, setting out a tiered system of regulation in its maritime zones. This provides that the level of jurisdiction that States have over archaeological objects depends on their geographical location. Generally, the closer an object is to a State, the greater the degree of legislative and enforcement jurisdiction the State may exert. However, UNCLOS largely fails to address the specific needs of UCH and only refers to it in two broad articles.<sup>3</sup>

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<sup>1</sup> For example, the *Nuestra Senora de Atocha*. See *Treasure Salvors I* 569 F.2d 330, 337 (5<sup>th</sup> Circuit 1978).

<sup>2</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396 (UNCLOS).

<sup>3</sup> Arts 149 and 303, UNCLOS. Art 149 provides that all objects of an archaeological nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole. Art 303 provides that States have the duty to protect objects of an archaeological nature found at sea and shall cooperate in doing so. The latter also creates a legal fiction to give coastal States jurisdiction over such heritage in the contiguous zone.

Shipwrecks in internal waters and the territorial sea will be subject to the laws of the coastal State, and although Articles 149 and 303 provide some protection in the Area and the contiguous zone respectively, UNCLOS is silent on how UCH should be managed in these zones. This leaves a clear geographical gap where archaeological objects are left vulnerable to unregulated interference; a legal vacuum thus exists for the protection of UCH in a large expanse of water, stretching from the seaward limit of the contiguous zone<sup>4</sup> to the outer boundary of the exclusive economic zone (EEZ).<sup>5</sup> As a result, UNCLOS has been heavily criticized for promoting a ‘freedom of fishing’ for such objects.<sup>6</sup>

The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (UNESCO Convention)<sup>7</sup> was introduced to provide a much-needed international framework to properly regulate interference with UCH in all maritime zones. The Convention has found support for its general principles amongst most States, however ratification has been slow amongst major maritime powers and the UK is yet to become a party. At the time of signature, the UK had many concerns with the Convention that it viewed as barriers to ratification, stating later that it ‘has ceased to discuss, yet alone explore, with interested parties the possibility of modifying its stance in the future.’<sup>8</sup>

Stakeholders have been working to compel the UK to ratify the Convention for a number of years, including the European Commission, which encouraged member States to ratify in 2006,<sup>9</sup> and the United Nations General Assembly in 2016.<sup>10</sup> Two meetings at Burlington House,<sup>11</sup> held in 2005 and 2010, were dedicated to promoting the UK’s acceptance of the treaty resulting in the Burlington House Declaration.<sup>12</sup> In 2013, the British Academy and the Honor Frost Foundation convened a joint Steering Committee of archaeologists and UCH experts, resulting in the publication of an independent Impact Review<sup>13</sup> by the UK UNESCO 2001 Convention Review Group.<sup>14</sup>

<sup>4</sup> If a State even decides to claim a contiguous zone in the first place. The UK, for example, does not.

<sup>5</sup> States have the right to claim a territorial sea not exceeding 12 nautical miles from the baseline (Art 3 UNCLOS), a contiguous zone not exceeding 24 nautical miles from the baseline (Art 33 UNCLOS) and an EEZ not exceeding 200 nautical miles from the baseline (Art 57 UNCLOS). Baselines are determined in accordance with Arts 5-7 UNCLOS.

<sup>6</sup> See generally, T Scovazzi ‘The Law of the Sea Convention and Underwater Cultural Heritage’ (2012) 27 IJML 753. Art 303 also upholds the law of salvage.

<sup>7</sup> Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) UNESCO Doc.31C/Resolution 24; (2002) 41 ILM 37.

<sup>8</sup> MV Williams, ‘UNESCO Convention on the Protection of the Underwater Cultural Heritage: An Analysis of the United Kingdom’s Standpoint’ (The UNESCO Convention for the Protection of the Underwater Cultural Heritage: Proceedings of the Burlington House Seminar, London, October 2005) 10.

<sup>9</sup> EC Green Paper, ‘Towards a future Maritime Policy for the Union: A European Vision for the Ocean and Seas (Brussels, 7 June 2006) Doc. COM (2006) 275 final, Volume II – Annex, 48.

<sup>10</sup> UNGA Res A/RES/71/257. This is a turnaround indeed, as UNGA initially failed to endorse the Convention’s final text.

<sup>11</sup> The meetings were attended by delegates from UK Government departments, national heritage agencies and key voluntary bodies.

<sup>12</sup> The Burlington House Declaration asks the Government to ratify the Convention. For the full text of the Burlington House Declaration, see <<http://www.jnapc.org.uk/Burlington%20House%20Proceedings%20final%20text.pdf>>.

<sup>13</sup> UK UNESCO 2001 Convention Review Group, ‘The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom’ (2014) ISBN 978-0-904608-03-8.

<sup>14</sup> Comprising underwater archaeologists and policy experts within the field. The Final Report of the Review provides a balanced analysis of administrative and policy implications in ratifying the Convention, *ibid* 12.

A Briefing Note on the case for UK ratification was published subsequently in March 2014,<sup>15</sup> building on the work of the Impact Review and highlighting the importance of safeguarding UK interests in historic shipwrecks around the world.<sup>16</sup> In 2015, a Policy Brief published by the UK National Commission for UNESCO<sup>17</sup> recommended that the UK Government should reevaluate whether it should ratify the Convention.<sup>18</sup>

There was renewed hope in March 2016 when the Government made a commitment to review its position on the Convention.<sup>19</sup> However, on 31 October 2017, the Department for Digital, Culture, Media and Sport (DCMS) made a disappointing announcement that will surely come back to haunt it. The Government noted that it has had to reconsider its priorities and its ability to carry out a review in the light of changing circumstances. It stated, ‘we have decided to defer the review while we focus our efforts and resources on delivering new and more immediate priorities’, but that it remains committed to reviewing its position when priorities and resources permit.<sup>20</sup>

Strengthening and safeguarding the protection of underwater heritage *is* an immediate priority. Technological developments have made shipwrecks increasingly accessible – and increasingly vulnerable – to interference by treasure hunters and salvors.<sup>21</sup> A Royal Navy Loss List,<sup>22</sup> published in 2014, indicated that there are over 4,747 Royal Navy wrecks from the period 1600-1945 in oceans all over the world. The assessment also shows that as many as two-thirds of these wrecks are World War I and World War II losses. As these wrecks reach the 100-year threshold to fall within the remit of the UNESCO Convention, and so eligible for greater protection, ratifying the Agreement becomes more significant than ever. Treasure salvors, metal looters and grave robbers are not moved by government priorities.

Against this background, this paper rigorously examines the validity of the three main reasons that have historically been put forward by the UK to justify its non-ratification of the Convention: that the Convention contains an overly broad definition of UCH, erodes the sovereign immunity principle for wrecked warships, and incorporates a creeping coastal State jurisdiction. This analysis intends to place the UK in a more cognizant position from which to review ratification, and given that these are also the most common objections raised by maritime States, this article aims to unpack those key arguments whilst considering their broader significance. In the context of the UK’s most recent standpoint on the Convention, this paper also continually maintains

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<sup>15</sup> 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: the case for UK ratification (March 2014) < <http://honorfrostfoundation.org/wp/wp-content/uploads/2016/04/2001-Convention-The-Case-for-Ratification-FINAL.pdf>>.

<sup>16</sup> *ibid* 3.

<sup>17</sup> United Kingdom National Commission for UNESCO, ‘UNESCO Convention on the Protection of Underwater Cultural Heritage: Next steps for the UK government’ (March 2015) Policy Brief 17.

<sup>18</sup> *ibid* 5.

<sup>19</sup> DCMS, ‘The Culture White Paper’ (March 2016) 46. This was followed by a response to a written parliamentary question in November 2016, which stated that the ‘Government remains committed to reconsidering the case for ratification of the [Convention]’ and that a decision on timescales would be made late Spring 2017 <<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-11-21/53922/>>.

<sup>20</sup> Department for Digital, Culture, Media and Sport written statement, HC Deb, 31 October 2017, cWS.

<sup>21</sup> As examined in greater detail below in Part 3, a number of WWI wrecks from the Battle of Jutland have already been salvaged for metal. Over the last few years, a number of British WWII wrecked warships have also disappeared from the Java Sea, again salvaged for metal. See, for example, K Lamb, ‘Lost bones, a mass grave and war wrecks plundered off Indonesia’ *The Guardian* (London, 28 February 2018). Lamb reports that salvors have recovered the bones of Allied soldiers killed in action in WWII.

<sup>22</sup> Final Report (n 13), Royal Navy Loss List, Annex 2.

that this volte-face is a regressive step and emphasizes the importance of prioritizing ratification.

Section II will first outline the main provisions of the Convention and its drafting history, before examining the three objections in detail in Section III. Section IV offers some concluding remarks, arguing that the UK's retrograde position on the Convention should be promptly reassessed.

## II. NEGOTIATING BACKGROUND & OUTLINE OF MAIN PROVISIONS

The Cultural Heritage Committee of the International Law Association (ILA) had been working on a draft Convention since 1988 as a response to the growing concerns regarding UCH, prior to transmitting the matter to UNESCO, which it felt was the most appropriate body to take action. The UNESCO Executive Board at its 141<sup>st</sup> session requested the Director-General to consider the feasibility of an international instrument on the protection of UCH.<sup>23</sup> The resulting feasibility study noted that the 'recent accessibility of underwater wrecks has been followed by severe looting'<sup>24</sup> and that the 'situation of the cultural heritage outside the territorial sea is now critical.'<sup>25</sup> It was also observed that little time was spent on the issue during UNCLOS discussions, as it was not dealt with until the final days of lengthy negotiations.<sup>26</sup> Amendments to both UNCLOS and the UNESCO World Heritage Convention were considered,<sup>27</sup> but as UNCLOS applies to general rules on the law of the sea, and the World Heritage Convention applies to heritage of outstanding universal significance within a State's territory, neither was contemplated to be a good solution.

The UNESCO Executive Board convened a group of experts to debate the proposals outlined by the study and report to the next General Conference. This group of experts convened in May 1996 and consensus was reached that a new international instrument was required. Upon the invitation of the 29<sup>th</sup> UNESCO General Conference, the Director-General assembled a meeting of governmental experts and representatives of international organizations to prepare a first draft.<sup>28</sup> The final text was adopted by the General Conference and approved by States in 2001, despite the fact that they were unable to reach unanimity on the whole text. Strong opposition was provided by Russia, the USA<sup>29</sup> and Norway as they considered the Convention to be a radical departure from the 'delicate balance of UNCLOS.'<sup>30</sup>

The Convention applies to UCH, as defined in Article 1(a); "Underwater cultural heritage" means all traces of human existence having a cultural, historical or

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<sup>23</sup> *Decisions adopted by the Executive Board at its 141<sup>st</sup> Session*, Paris, 17 June 1993 UNESCO Doc. 141 EX/Decisions, 34.

<sup>24</sup> *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, Paris, 23 March 1995, UNESCO Doc.146 EX/27, para 9.

<sup>25</sup> *ibid* para 27.

<sup>26</sup> *ibid* para 13.

<sup>27</sup> *ibid* paras 41-2. Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151.

<sup>28</sup> *Decision on the Report by the Director-General on the Reinforcement of UNESCO's Action for the Protection of the World Cultural and Natural Heritage*, UNESCO document 141 EX/SR 15 para 15.

<sup>29</sup> Despite not being a member of UNESCO at that time.

<sup>30</sup> R Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage' in R Garabello & T Scovazzi (eds), *The Protection of the Underwater Cultural Heritage before and after the 2001 UNESCO Convention* (Martinus Nijhoff Publishers 2003) 92.

archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years...' Eleven objectives and general principles of the Convention are set out in Article 2, ensuring that State Parties cooperate to protect UCH, that *in situ* preservation of UCH is considered as the first option, and that any recovered UCH is conserved and managed to its long-term preservation. Article 3 notes that no provisions affect the rights of States under international law, and that they shall be interpreted in a way that is consistent with UNCLOS.

Some of the Convention's most important articles provide that UCH shall not be commercially exploited.<sup>31</sup> It is clear that although Article 4 attempts to exclude the undesirable aspects of salvage law, it was not possible for the Convention to exclude its use altogether as identifiable owners should not be denied of their property rights. A compromise is made in Article 4 that UCH can only be subject to salvage law if it is authorized by the competent authorities, is in full conformity with the Convention, and it ensures that any recovery of UCH achieves its maximum protection. Articles 7 to 12 of the Convention regulate activity in the maritime zones as set out by UNCLOS, and also provide for reporting and notification in such areas. Article 18 provides for the seizure and disposition of UCH. This paper examines many of these provisions below.

It was considered that a set of archaeological standards for activities directed at UCH should be formulated separately from the Convention so that they may be easily amended if required. It was ultimately decided that agreeing on a process for amending separate archaeological guidelines would be much more complex,<sup>32</sup> and so they were incorporated as a formal part of the Convention in the Annex. These guidelines are viewed as an excellent framework for the protection and responsible recovery of UCH, and are even supported by many States not party to the Convention.<sup>33</sup>

### III. PROBLEMS AND PROSPECTS

The UNESCO Convention, as illustrated by the numerous disagreements over drafts,<sup>34</sup> is a contentious instrument for a number of reasons. These reasons have prevented some traditional maritime nations, such as the UK, USA, Norway and Russia, from signing the Convention. The ratification of the Convention by such States is instrumental to the success of the Convention, given that all are active flag States.<sup>35</sup> Despite receiving 87 approvals in the original vote, the Convention took eight years to enter into force and at the time of writing only has 58 State party ratifications fifteen years on.

At the initial vote in Paris, States had many different reasons for their abstentions or negative votes. For example, Sweden abstained from voting on the Convention as 'the consensus goal stumbled over two crucial issues: jurisdiction and State vessels.'<sup>36</sup> Similarly, the USA, although not a member of UNESCO at the time of

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<sup>31</sup> For example, Art 2(7) and Rule 2 Annex.

<sup>32</sup> Garabello (n 30).

<sup>33</sup> For example, the UK. See UNESCO Convention on the Protection of the Underwater Cultural Heritage: UK Explanation of Vote' United Kingdom Foreign & Commonwealth Office: 2001.

<sup>34</sup> See generally, Garabello (n 30).

<sup>35</sup> Notable non-parties include Australia, China, Cyprus, Germany, Greece, Indonesia, Ireland, Japan, Malaysia, the Netherlands, Norway, the Philippines, Russia, Singapore, Turkey, the UAE, the UK, and the USA. These States either have a large number of vessels in their registries, a large number of wrecks in their jurisdictional waters, or possess the technology to salvage UCH. Many of their reasons for non-membership are explained below in Part 3. Notable State parties include France, Italy, Portugal and Spain, all of which have a rich maritime history.

<sup>36</sup> *ibid* 250.

the vote, declared it would have not accepted the Convention regardless, due to a number of concerns mainly regarding jurisdiction and the threat to sovereign immunity.<sup>37</sup>

The UK's ratification is key to influencing developments, particularly given its geographical position in Northern Europe, where it has been identified that a lack of ratifications around the North Sea may pose an obstacle for the effectiveness of the Convention.<sup>38</sup> However, the UK has identified a number of problems that have prevented it from doing so, namely that the Convention possesses:

1. an over-inclusive definition of UCH;
2. a threat to the sovereign immunity principle; and
3. the potential for creeping jurisdiction that upsets the delicate balance of rights set out in UNCLOS.<sup>39</sup>

Each of these issues is examined and resolved below, incorporating arguments for the prioritization of ratification into the analysis to drive forward the debate on reviewing the Convention.<sup>40</sup>

### *A. Over-inclusive Definition of Underwater Cultural Heritage*

As outlined in Article 1 of the Convention, 'underwater cultural heritage means *all traces of human existence having a cultural, historical or archaeological character* which have been partially or totally underwater, periodically or continuously, for at least 100 years.'<sup>41</sup> The inclusion of a time limit is important given that salvage law operates in many jurisdictions, and a clear division is required to determine when salvage would cease to apply and when the Convention's provisions would begin, particularly as the Convention renders salvage law inapplicable in most circumstances.<sup>42</sup> In *King & Chapman v "La Lavia," "Juliana" and "Santa Maria de la Vision"*<sup>43</sup> Mr Justice Barr stated that it seems 'when so much time has elapsed since the original loss of a vessel ... then the wreck should be regarded as having passed from the commercial realm of maritime salvage into the domain of archaeological law.'

It could be argued that any trace of human existence over 100 years old could be categorized as having a 'cultural, historical or archaeological character', as 'character' does not necessarily mean that the object has importance or value. The question of a significance criterion within the definition of UCH proved to be a contentious matter during negotiations,<sup>44</sup> but it was generally accepted by most States that 'character'

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<sup>37</sup> *ibid* 252.

<sup>38</sup> UCH/17.6.MSP/3, 14. In 2016, the Netherlands officially announced its intention to ratify, stating that 'the urgency to protect the underwater cultural heritage at the international level is high' <<https://www.government.nl/latest/news/2016/05/19/the-netherlands-will-protect-the-underwater-cultural-heritage>>.

<sup>39</sup> See UK Explanation of Vote (n 33).

<sup>40</sup> The Impact Review referred to above considers provisions that may present challenges in terms of requiring new administrative arrangements or reallocation of resources. As these are more typically heritage management issues rather than substantive points of law, they will not be considered in this paper.

<sup>41</sup> Art 1(a), emphasis added. It should be noted that the Convention's operational guidelines suggest that a State can choose to apply the provisions to objects and sites under 100 years, *Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage*, CLT/HER/CHP/OG 1/REV (August 2015) 4.

<sup>42</sup> For example, Art 4. See also above (n 31).

<sup>43</sup> [1986] No 11076, 11077, 11078 P (Transcript) (Ir H Ct 1994).

<sup>44</sup> Garabello (n 30) 106-9.

sufficiently limited the scope of the Convention.<sup>45</sup> The UK, however, perceived this to be an extremely broad definition of UCH and ultimately this was given as a reason why the UK could not agree to the final text:

the text obliges signatory States to extend the same very high standards of protection to all underwater archaeology over 100 years old. It is estimated there are probably about 10,000 wreck sites on the seabed under the [UK]'s territorial sea and it would neither be possible nor desirable to extend legal protection to all of them. The [UK] believes it is better to focus its efforts and resources on protecting the most important & unique examples of underwater cultural heritage. It would simply be impossible to enforce the application of the rules in the Annex to every one of the thousands of wreck sites.<sup>46</sup>

To try and move the UK towards a more informed position from which to reconsider ratification, the UK's explanation of vote will be analysed, focusing on three key issues:

1. A fundamental misunderstanding of the Convention's provisions and purpose
2. An overestimation of the number of wrecks to be protected
3. An apparent willingness to accept a broad definition of cultural heritage in other legal instruments

### *1. A fundamental misunderstanding of the Convention*

To understand the rationale behind the UK's position on the Convention, one must appreciate its method of heritage protection, which is a site-based, selective approach. Although there now exists some divergence in the way that wreck sites are protected in the devolved nations,<sup>47</sup> previously the Protection of Wrecks Act 1973 had regulated this issue on a national level. Under this statute, applications must be made for wrecks to be formally designated and even then, they must be of 'historical, archaeological or artistic importance'.<sup>48</sup> This approach is responsive, meaning that a wreck must first be discovered before it can be designated and protected, and thus far, only 63 wrecks have successfully met these criteria. Any person wishing to engage with these sites must then apply to the relevant heritage body for a license.

The notion of significance has been a central factor in the UK's policy on heritage protection. As the Convention does not include such a criterion, the UK interpreted Article 1 to mean that it would have to extend the same level of protection – and resources – to every shipwreck on the territorial seabed, of which it estimated there to be 10,000.<sup>49</sup> Presumably this position is founded upon fears of a significant, and likely unquantifiable, financial burden and legislative disruption. This is a misconception of what the Convention proposes to achieve, based upon the erroneous view that the site-based approach is the only strategy, and resulting in the belief that the UK would be required to designate all UCH that fell within the, *prima facie*, broad definition. This misconception could be the result of a non-specialist UK delegation at

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<sup>45</sup> *ibid* 109.

<sup>46</sup> UK Explanation of Vote (n 33).

<sup>47</sup> Although the semantics of the UK's devolved settlement are largely outside the scope of this particular paper, Northern Ireland, Scotland and Wales have the required legislative competence to create their own legislation over heritage matters.

<sup>48</sup> Section 1 Protection of Wrecks Act 1973, emphasis added.

<sup>49</sup> An earlier figure in the negotiations was given as half a million wrecks, see Garabello (n 30) 108.



the UNESCO consultation meetings.<sup>50</sup> Those present lacked any archaeological background or qualifications, and the delegation did not include any broader representation from NGOs either.<sup>51</sup> The only specialist advice provided at the time was legal and provided by FCO lawyers.<sup>52</sup>

The Convention makes no mention of protecting individual sites, rather it takes an activity-based approach. This means that the aim of the Convention is not protecting UCH by designating all sites that fall within the definition, rather it is to protect UCH by regulating *activities directed at* UCH. Other States appeared to grasp this concept more easily during negotiations, with Canada, for example, noting during the adoption of the text that '[the] work has resulted in a text that is focused on "activities directed at" underwater cultural heritage.'<sup>53</sup>

Article 7(2) imposes a duty on State parties to ensure the Rules in the Annex are applied to activities directed at UCH in the territorial sea. Such activities are defined in Article 1(6) as having UCH as their primary object and which may, directly or indirectly, physically disturb or otherwise damage UCH. This definition narrows the scope of activities further still, as they must satisfy two criteria to fit the remit of the obligation: having UCH as the primary object, and physically disturbing or damaging UCH. Moreover, Article 2(4) states that 'State Parties shall...take all *appropriate* measures...that are necessary to protect [UCH], using for this purpose the *best practicable means at their disposal* and *in accordance with their capabilities*.'<sup>54</sup> The measures to be taken in each instance should be determined *as appropriate*. Read in its entire context, it seems difficult to understand how this could have been an obstacle.

This approach could procure a highly flexible and context-specific approach to address the individual needs of particular UCH within the capabilities of the UK. The most significant wrecks could still be afforded statutory protection using a site-based approach, but there is scope within the Convention's provisions to exercise judgment in safeguarding non-designated wrecks. The UK expressly recognizes that the absence of designation does not lower significance.<sup>55</sup> Where UCH falls within the Convention's definition but the UK does not deem designation necessary, the State's obligations would simply be to regulate activities *with UCH as the primary object that may result in physical disturbance*, as outlined in Article 7(2). The UK already has a system in place regulating marine activities, which is capable of incorporating the obligation with little legislative change.

The Marine and Coastal Access Act 2009 and the Marine (Scotland) Act 2010 provide a mode of regulating marine activities. Licenses are required in the UK's inshore areas<sup>56</sup> for various activities, such as removing an object from the seabed using a vessel or floating container. Many of the activities for which the Convention is directed at will fall within the existing requirements for a marine license. This means that the additional number of activities requiring regulation under the Convention will be very small, particularly as they need to have UCH as the primary object and involve

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<sup>50</sup> Williams (n 8) 2.

<sup>51</sup> *ibid.* Williams notes that the division in opinion between interested parties to the draft Convention may explain the lack of NGO representation that many other States had.

<sup>52</sup> *ibid.*

<sup>53</sup> Garabello (n 30) 242.

<sup>54</sup> Emphasis added.

<sup>55</sup> *UK Marine Policy Statement* (March 2011) <

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69322/pb3654-marine-policy-statement-110316.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69322/pb3654-marine-policy-statement-110316.pdf)> 22.

<sup>56</sup> Granted by the Marine Management Organisation (England), DAERA (Northern Ireland), Marine Scotland, Natural Resources Wales.

physical disturbance of that heritage. Currently a license is not required to remove something from the seabed by hand,<sup>57</sup> but it would be relatively straightforward to add provisions whereby a license is required if the activity falls within the Convention's criteria. Such provision would also ensure that where intrusive work is carried out it will be done in accordance with archaeological standards, such is the obligation in Article 7(2). Activities falling outside of this scope would not require regulation, such as fishing, dredging, and non-intrusive wreck diving.<sup>58</sup> The Convention does not restrict divers, but ensures that physical intervention conforms to archaeological standards where UCH is concerned.

## 2. Overestimation of the number of wrecks

The UK explanation of its vote alludes to '*probably 10,000 wreck sites on the seabed under the UK's territorial sea*'<sup>59</sup> and declares that protecting all of these would be impossible. In actuality, there is significant evidence that the number of known wrecks in the territorial sea that fall within the Convention's definition is substantially lower than the estimate noted by the UK. The number of wrecks known to be over 100 years old is less than one thousand,<sup>60</sup> and by 2018 will be approximately 2,800 owing to the large number of ships sunk in battle during WWI.<sup>61</sup> Firth notes that wrecks dating prior to 1860 are so rare that they are highly likely to be significant for one reason or another.<sup>62</sup>

Let us assume that the UK is correct that the number of wrecks is 10,000 and all of them require designation. Even then it is difficult to see how it would 'simply be impossible' to enforce the Convention's rules when comparing UCH to terrestrial sites. Where an activity may affect a scheduled monument or listed building, an application for Scheduled Monument Consent (SMC) or Listed Building Consent must be made. Collectively, there are approximately 34,000 scheduled monuments across the UK,<sup>63</sup> with hundreds of thousands of listed buildings. With this in mind, the provisions of the Convention are not impossible. UCH is much less accessible than land sites, and is likely to be subject to less interference and activity as a result.

In any event, as the Convention does not implement a site-based approach, the number of wrecks in the UK's territorial sea falling within the definition becomes immaterial. The focus should be shifted to the number of activities directed at UCH. Firth notes that the likely number of licensable activities each year will be very low, amounting only to a few tens, especially if the licensable activities through the

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<sup>57</sup> However, other legislation must be complied with, e.g. Protection of Wrecks Act 1973, Protection of Military Remains Act 1986.

<sup>58</sup> There is an obligation in Art 5 on State Parties to use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting UCH. Such activities are defined in Art 1(7) as not having UCH as their primary object.

<sup>59</sup> Emphasis added.

<sup>60</sup> A Firth, 'Underwater Cultural Heritage off England: character and significance' (Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK: Proceedings of the JNAPC 21<sup>st</sup> Anniversary Seminar, London, November 2010) 17.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.* This means that they would likely be designated by the UK in any case.

<sup>63</sup> Figures available at <<https://www.communities-ni.gov.uk/articles/scheduled-monuments#toc-0>>, <<http://cadw.gov.wales/historicenvironment/protection/monuments/?lang=en>>, <<https://historicengland.org.uk/listing/what-is-designation/scheduled-monuments/>>, <<https://www.historicenvironment.scot/advice-and-support/listing-scheduling-and-designations/scheduled-monuments/types-of-scheduled-monument/>>.

Protection of Wrecks Act 1973 are set aside.<sup>64</sup> Non-intrusive activities and those not having UCH as their primary purpose fall outside the Convention's scope.

This 'blanket approach' means that the system can protect heritage sites prior to discovery. The problem with a site-based, reactive system is that interference can occur between discovery and designation. For example, the *HMS Association* was discovered prior to the enactment of the Protection of Wrecks Act 1973 and news of the discovery brought about salvors who recovered over 2,000 artefacts, leaving the wreck in such a state that when the Act came into force she was considered not worth protecting.

In terms of cost, blanket protection has shown to be the most convenient and effective administrative procedure for the protection of UCH.<sup>65</sup> Assessment of significance requires effort and is likely to involve extensive physical intervention. In Australia, historic shipwrecks over 75 years old are given blanket protection. This has worked well in terms of providing clarity for heritage managers, divers, treasure hunters and marine developers in knowing what the compliance requirements are – significance is still a factor in terms of a finder's reward or assessing intervention, but it is not the primary purpose of the system.<sup>66</sup>

### *3. Acceptance of other broad cultural heritage definitions*

The definition of UCH in the Convention is consistent with what the UK subscribes to both nationally and internationally. The UK has ratified the European Convention on the Protection of the Archaeological Heritage 1992 (Valletta Convention),<sup>67</sup> which has a broad definition of archaeological heritage. Article 1 provides that archaeological heritage 'shall be considered to be elements of the archaeological heritage all remains and objects and any other traces of mankind from past epochs.' This lacks a significance criterion, but the UK is still a State party.

More recently in the UK Marine Policy Statement (MPS),<sup>68</sup> published in 2011, a very broad definition of the historic environment includes 'all aspects of the environment resulting from the interaction between people and places through time, including *all surviving physical remains* of past human activity, whether visible, buried or submerged.'<sup>69</sup> This is a much wider definition than the Convention's historic 'character' criterion. The MPS distinguishes between all remains, and those elements that have been identified as 'holding a degree of significance', which it calls 'heritage assets.'<sup>70</sup> The MPS indicates that marine planning authorities should consider undesignated assets subject to the same policy principles as those that are designated.<sup>71</sup> It seems that the UK could easily continue this approach in conformity with the Convention.

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<sup>64</sup> Firth (n 60) 20.

<sup>65</sup> G Henderson, 'Significance assessment or blanket protection?' (2001) 30(1) *The International Journal of Nautical Archaeology* 3.

<sup>66</sup> *ibid* 4.

<sup>67</sup> European Convention on the Protection of the Archaeological Heritage (Valletta Convention, Revised) ETS No. 143.

<sup>68</sup> Marine Policy Statement (n 55).

<sup>69</sup> *ibid* 21, emphasis added.

<sup>70</sup> It defines 'significance' as the value of a heritage asset to this and future generations because of its heritage interest, which may be archaeological, architectural, artistic or historic, which remains a very broad definition.

<sup>71</sup> *ibid* 22.

Finally, a consultation on the marine planning system in England noted that planners would be expected to take account of the principles set out in the Annex of the Convention.<sup>72</sup> If there is an expectation for the Rules to be applied to heritage in the UK's territorial sea, this narrows the gap between the Convention and UK law further still.

It is clear from this analysis that it is the UK's interpretation which is problematic, rather than the definition of UCH itself. The Convention does nothing more than place a duty on States to ensure that activities conform to archaeological guidelines if they are both directed at UCH and likely to disturb or damage such objects. Even then, States are able to act in accordance with their capabilities. The Convention does not require the UK to designate any more wrecks than it deems appropriate, or regulate every single activity involving UCH. Given that the number of wrecks falling within the Convention's scope is significantly lower than originally anticipated, the number of activities that require regulation will also be lower. Although this may require some administrative changes, it should not be too onerous for the UK to execute given that a marine licensing system already exists for other activities. This should no longer be employed as a reason to justify non-ratification and should not delay a review of the Government's position.

### *B. Erosion of the Sovereign Immunity Principle*

Sovereign immunity is granted to State-owned vessels that are used for non-commercial purposes, for example, warships.<sup>73</sup> This principle of international law is enshrined in UNCLOS, where Articles 95 and 96 provide that warships and State-owned vessels used on non-commercial service have 'complete immunity from the jurisdiction of any State other than the flag State.'<sup>74</sup> However, international law rules do not address whether sovereign immunity applies to *sunken* State vessels. Wrecked warships are understandably controversial for political and emotive reasons; they may carry objects vital to national security, munitions, or pose risks to diver safety or the environment. Many of them are the gravesites of soldiers lost in battle, whose relatives may still be living.

In the UK's view, sunken State vessels retain sovereign immunity unless they are expressly abandoned,<sup>75</sup> even if they lie in the high seas or within the jurisdiction of another State. This means that a coastal State cannot permit interference with the wreck site without the express authorization of the flag State. Whilst Article 2(2) of the draft UNESCO Convention initially excluded State-owned wrecks,<sup>76</sup> they were included in

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<sup>72</sup> Consultation on a Marine Planning System for England (DEFRA, July 2010) 20, n 41. It would be reasonable to assume that the devolved nations may also take this approach.

<sup>73</sup> See *The Parlement Belge* (1880), 5 P.D. 197.

<sup>74</sup> Arts 17, 58(2) UNCLOS. See also Brussels Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships and Additional Protocol (adopted 10 April 1926 and 24 May 1934, entered into force 8 January 1937) 176 LNTS 199; Arts 8(1) and 9, Geneva Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11; and Art 16, UN Convention on the Jurisdictional Immunities of States and their Property (adopted 2 December 2004, not yet in force). The concept of sovereign immunity was also upheld by ITLOS in *The ARA Libertad Case (Argentina v Ghana)* [2012] ITLOS Rep 21.

<sup>75</sup> *Protection and Management of Historic Military Wrecks outside UK Territorial Waters: Guidance on how existing policies and legislation apply to historic military wreck sites* (DMCS and the Ministry of Defence, April 2014) 7.

<sup>76</sup> Garabello (n 30) 110-11.

the final text's scope. To exclude them would have diminished the Convention's regime as a lot of UCH are also, by proxy, State-owned vessels. With their inclusion, the UK perceived the Convention as restricting flag States' rights in respect of sunken State vessels, as clarified in its explanation of vote:

The United Kingdom considers that the current text erodes the fundamental principle of customary international law, codified in [UNCLOS] ... of Sovereign Immunity ... in a way unacceptable to the United Kingdom.<sup>77</sup>

For the UK, and many other States,<sup>78</sup> the problematic provisions are Article 7(3):

Within their ... territorial sea, in the exercise of their sovereignty ... States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, *should* inform the flag State Party to this Convention and, *if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.*<sup>79</sup>

and Article 10(7), which refers to foreign wrecked warships in the EEZ and on the continental shelf:

*'Subject to the provisions of paragraphs 2 and 4 of this Article, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.'*<sup>80</sup>

States argue that Article 7(3) does not confer an obligation on the coastal State to inform the flag State of any discoveries. Proposals by the UK, Russia and France to make the coastal State's consultation with the flag State mandatory were rejected during negotiations.<sup>81</sup> The problem with Article 10(7) is that the Convention does not explicitly preclude Coordinating State<sup>82</sup> interference with foreign wrecked warships in the EEZ and on the continental shelf owing to the inclusion of paragraphs 2 and 4.

This section addresses a number of relevant questions relating to these reservations, the analysis of which should reassure the UK, and other States, of the Convention's position with regard to wrecked warships:

1. Does sovereign immunity extend to sunken warships?
2. Do Articles 7(3) and 10(7) of the Convention alter this position in any way?
3. Is the Convention more effective than the sovereign immunity principle in protecting wrecked warships?

The final question specifically addresses the advantages of the Convention over the sovereign immunity principle in protecting war wrecks, emphasizing the need for the UK to re-prioritize ratification of the Agreement.

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<sup>77</sup> UK Explanation of Vote (n 33).

<sup>78</sup> States' explanations of votes and statements are reproduced in Garabello (n 30) 239-53.

<sup>79</sup> Emphasis added.

<sup>80</sup> Emphasis added.

<sup>81</sup> The UK and Russia (31 C/COM.IV/DR.5) and France (31 C/COM.IV/DR.4) attempted to change the word 'should' to 'shall' a few days before the final vote.

<sup>82</sup> The Convention does not refer to 'coastal State' anywhere in the text, however, the coastal State is the default Coordinating State under Art 10(3) unless it opts out of doing so.

### 1. Extension of sovereign immunity to wrecked warships

Some commentators deem that once sunk, a vessel fails to retain its status as a 'ship' and consequently does not retain its immunity.<sup>83</sup> UNCLOS does not define 'ship', but Article 29 describes a 'warship' as being 'under the command of an officer' and 'manned by a crew', which does suggest that the ship must be afloat to fall within the definition.<sup>84</sup> Similarly, the 1989 Salvage Convention defines a 'vessel' as being 'capable of navigation.'<sup>85</sup> For these reasons, *inter alia*, Ronzitti has stated the customary nature of this principle is doubtful.<sup>86</sup>

Upon examining UNCLOS in a broader context, the definition of a warship only becomes relevant when differentiating between provisions relating to warships and all other ships.<sup>87</sup> Many States with strong views on extending sovereign immunity to wrecked warships have ratified both UNCLOS and the Salvage Convention;<sup>88</sup> they could not have intended that these Conventions would limit their immunity to warships and government vessels afloat.

There is also the argument that immunity should apply only to recently sunk vessels. Forrest debates that 'while there are legitimate security and national intelligence reasons for granting exclusive flag State jurisdiction in the case of recently sunken State-owned vessels, these considerations do not, however, apply to sunken State-owned vessels that fall within the definition of [UCH].'<sup>89</sup> However if it is contended that wrecked warships fail to retain their immunity, as they are not manned 'ships' or capable of navigation, then in applying this logic even recently wrecked vessels could not retain sovereign immunity as 'warships'. There must be another theoretical basis for wrecked warships to retain their immunity.

It seems more reasonable to submit that immunity is only retained as long as necessary to protect State interests, but who decides when such interests no longer require protecting? Most States tend to agree that immunity no longer applies if ownership in the shipwreck is expressly abandoned or relinquished.<sup>90</sup> Dromgoole views this as having transgressed into customary law,<sup>91</sup> and *La Belle* and *Le Corossol* both demonstrate the necessity of an express abandonment of ownership.<sup>92</sup> It could be viewed that express abandonment by a State would be an implicit statement that it no

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<sup>83</sup> See generally, L Caflisch, 'Submarine Antiquities and the International Law of the Sea' (1982) 13 NYIL 3, 22, L Migliorino, 'The Recovery of Sunken Warships in International Law' in B Vukas (ed), *Essays on the New Law of the Sea* (University of Zagreb 1985) 251, N Ronzitti (Rapporteur), 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law' (Session of Rhodes, Greece 2011) 74 Yearbook of the Institute of International Law 133, 143.

<sup>84</sup> It should also be noted that immunity is also extended under Art 29 UNCLOS to 'other government ships operated for non-commercial purposes' for which a definition is not provided.

<sup>85</sup> International Convention on Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 165 (Salvage Convention) Art 1(b).

<sup>86</sup> Ronzitti (n 83). The Rapporteur of the IDI's 9<sup>th</sup> Scientific Commission drafted a Preliminary Report, which was discussed at the Rhodes Session in 2011, following which a Resolution was adopted by the Tallinn Session in 2015.

<sup>87</sup> For example, Art 107 UNCLOS provides that only warships (and other named vessels) may seize on account of piracy.

<sup>88</sup> For example, the UK and Russia have ratified both Conventions.

<sup>89</sup> C Forrest, *International Law and the Protection of Underwater Cultural Heritage* (Routledge 2011) 336. Ronzitti agrees with this principle; Ronzitti (n 83) 143.

<sup>90</sup> See Federal Register, Volume 69, Number 24 (Thursday, 5 February, 2004) 5647-8.

<sup>91</sup> S Dromgoole, 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law: The 2015 Resolution of the *Institut de Droit International*' (2015) 25 IYIL 181, 190.

<sup>92</sup> G Le Gurun, 'France' in S Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (2<sup>nd</sup> ed, Martinus Nijhoff 2006) 92-3.

longer needs to protect its interests through sovereign immunity, meaning the decision is made by the State itself on a case-by-case basis.

There is other evidence in international law that a sunken warship does retain its sovereign immunity. In conventional international law, and as an appendage to the sovereign immunity principle, the 1989 Salvage Convention explicitly does not apply to State-owned vessels,<sup>93</sup> and the recently in force Wreck Removal Convention<sup>94</sup> also excludes ‘any warship or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service, unless that State decides otherwise.’<sup>95</sup> This would fit the idea that wrecked warships retain their immunity.

In terms of customary international law, there is evidence of general State practice, whether or not it could be considered sufficiently consistent. The majority of major maritime States prescribe to the view that sunken warships retain sovereign immunity once sunk and have conducted themselves to this effect.<sup>96</sup> For instance, former US President Clinton explicitly stated that, ‘the United States retains title indefinitely to its sunken State craft unless title has been abandoned or transferred in the manner Congress authorized or directed.’<sup>97</sup> Past disputes have also been resolved by interstate agreements with the same principle. For example, in 1989, the UK and South Africa made an exchange of notes whereby South Africa recognized British title to the HMS *Birkenhead* located in its waters.<sup>98</sup> In 2003 an agreement was signed between the USA and France, giving the latter official title to the wreck of *La Belle*, sunk in 1686 off the coast of Texas. In 2011, the US 11<sup>th</sup> Circuit Court of Appeals affirmed that Spain was entitled to a presumption of immunity over the *Nuestra Señora de las Mercedes*, sunk off Portugal in 1804, under Section 1609 of the Foreign Sovereign Immunities Act 1976.<sup>99</sup>

With regard to *opinio juris*, many States have declared that they act in accordance with the ‘rule of international law’ that sovereign immunity is retained. For example, ‘the United States *recognizes the rule of international law* that title to foreign sunken State craft may be transferred or abandoned only in accordance with the law of the foreign flag State.’<sup>100</sup> Germany states that ‘*under international law*, warships and other ... State vessels and aircraft continue to enjoy sovereign immunity after

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<sup>93</sup> Art 4(1), Salvage Convention. Upon ratifying in 1994, the UK entered a reservation in accordance with Art 30(1)(d) that would allow UCH to be excluded from the remit of salvage law and the Convention. It has not yet chosen to exercise this right.

<sup>94</sup> Nairobi International Convention on the Removal of Wrecks (adopted 18 May 2007, entered into force 14 April 2015) 46 ILM 694.

<sup>95</sup> *ibid* Art 4(2).

<sup>96</sup> Such States include the USA, France, Germany, Japan, Russian Federation, Spain and the UK. See Federal Register (n 90) for full statements.

<sup>97</sup> ‘Presidential Statement on United States Policy for the Protection of Sunken State Craft’ 19 January 2001, Public Papers of the Presidents: William J. Clinton, vol. III, page 2956, Jan. 19 2001. Reprinted Federal Register (n 90).

<sup>98</sup> Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa concerning the regulation of the terms of settlement of the salvaging of the wreck of HMS *Birkenhead* (Pretoria, 22 September 1989) 1584 UNTS 321. For further examples, see MJ Aznar-Gomez, ‘Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage’ (2010) 25 IJMC 209, 221-3. Aznar-Gomez gives examples relating to Italy, Australia, the Netherlands, Norway, Germany, Singapore, Canada, Russia and Japan.

<sup>99</sup> The first such claim was made by Spain in 2000, where a federal appeals court in Virginia awarded ownership of *La Galga* and *Juno* to Spain rather than a treasure hunter who had spent nearly \$2million on preliminary recovery work and fees. Spain was supported by the UK and the USA.

<sup>100</sup> Federal Register (n 90), emphasis added.

sinking,<sup>101</sup> and Russia views that ‘*under international law of the sea* all the sunken warships and government aircraft remain the property of their flag State.’<sup>102</sup> Domestic law<sup>103</sup> and other State documents<sup>104</sup> could also be considered as evidence of such practice. It is clear that States believe they have legal authority to act in this way, and so the existence of *opinio juris* could be argued.

The *Institut de droit international*’s Resolution on ‘The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law’ (‘IDI Resolution’)<sup>105</sup> confirms wrecked warships’ immune status. Article 3 states that ‘sunken State ships are immune from the jurisdiction of any State other than the flag State.’ Although the theoretical basis for this is unclear, the *travaux préparatoires* appear to favour either State ownership<sup>106</sup> or the public property status<sup>107</sup> of such wrecks as justifications for immunity, rather than being immune by virtue of being ‘warships.’<sup>108</sup>

Finally, whilst the concept of submerged war graves does not currently exist in international law, it is customary international humanitarian law to respect, protect and properly maintain war graves<sup>109</sup> – *jus in bello* applies. Although there is no strict definition of the term ‘war graves’, it is understood to be a broad concept.<sup>110</sup> It is clear there are many possible theoretical bases for wrecked warships to retain sovereign immunity.

## 2. Does the Convention alter this position?

Although customary status is likely, it is difficult to say with certainty in the absence of judicial confirmation. What is important to note is that the UNESCO Convention does not modify *any* principle of sovereign immunity *from that which may already exist*. According to Article 2(8), ‘... nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State’s rights with respect to its State vessels and aircraft.’ States should be reassured that the Convention does not alter any existing principle of immunity.

Article 3 also notes that the Convention shall generally ‘be interpreted and applied in the context of and in a manner consistent with international law, including [UNCLOS].’ The UK states that the Convention alters the balance of coastal/flag State rights in UNCLOS, but incompatibility with UNCLOS is virtually impossible. Article 30(2) of the Vienna Convention on the Law of Treaties (VCLT)<sup>111</sup> provides that when

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<sup>101</sup> *ibid*, emphasis added.

<sup>102</sup> *ibid*, emphasis added.

<sup>103</sup> Sunken Military Craft Act 2005 (10 U.S.C. Section 113 *et seq.*) confirms that the USA does not lose ownership (and thus sovereign immunity) of a warship merely through the passage of time.

<sup>104</sup> MOD Guidance Document (n 75).

<sup>105</sup> Ronzitti (n 83) 371.

<sup>106</sup> As such vessels are State property, ownership remains with the State unless title is expressly transferred or abandoned.

<sup>107</sup> This view is supported by the Convention on Jurisdictional Immunities of States and their Property 2004 (n 74).

<sup>108</sup> Ronzitti (n 83) 142-5.

<sup>109</sup> J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, Volume 1: Rules (ICRC and Cambridge University Press 2006), Rule 115.

<sup>110</sup> A Petrig, ‘The war dead and their gravesites’ (2009) 91 IRRC 341, 344.

<sup>111</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.



a treaty specifies that it is not to be considered incompatible with another treaty, the provisions of the other treaty prevail.

The two problematic articles for States are Articles 7(3) and 10(7), reproduced in full above. Article 7(3) appears to fall short of placing an obligation on the coastal State to inform the flag State of any warship discoveries and there are concerns that informing any other States with ‘verifiable links’ could dilute the principle of sovereign immunity. Again, this should be read in conjunction with Article 2(8), which dictates that rules relating to immunity are not modified. This reinforces the fact that express State consent is a requirement. Similarly, Article 2(2) provides that State parties *shall* cooperate in the protection of UCH. This echoes the general provision in Article 303(1) UNCLOS, which provides that States have the duty to protect UCH objects found at sea and shall cooperate for that purpose. Should the coastal State neglect to inform the flag State of the discovery, it would surely breach both provisions.

The concept of a ‘verifiable link’ in Article 7(3) is particularly useful where the age or quality of a vessel makes it difficult to identify whether it is indeed a State vessel.<sup>112</sup> It still gives the potential flag State the right to be notified and consulted, and ensures that the coastal State cooperates with the flag State in guaranteeing the best possible protection for UCH. Similarly, where other States with ‘verifiable links’ may be contacted, for example State interests in cargo or crew, an opportunity is presented to cooperate in protecting the wreck.<sup>113</sup>

Although Article 10(7) provides that no activities shall be directed at warships without flag State consent, this is subject to paragraphs 2 and 4. Both paragraphs are examined in detail in Section 3 below, but Article 10(2) appears to give coastal States a broad right to prevent or authorize activities directed at UCH, including warships, in its EEZ and continental shelf; whilst Article 10(4) limits the scope of sovereign immunity by allowing coastal State to act prior to consultation. The former does not give the coastal State title over UCH in its territory, implicitly or otherwise. It is a necessary inclusion to balance the legitimate rights and sovereign interests of States, and simply restates the competence that States already have under UNCLOS to prevent interference with their sovereign rights.<sup>114</sup> The latter provision actually upholds the principle of immunity. The coastal State can take immediate action *only* to prevent damage to the UCH. This means that the coastal State can prevent looting or other damage to the foreign warship, thus preserving the wreck and its sovereign status.

### *3. Is the Convention more effective than the sovereign immunity principle?*

Although the UNESCO Convention does not modify any international law or State practice relating to sovereign immunity, not all jurists subscribe to the notion that a sunken warship retains its immunity. The theoretical basis for sovereign immunity over wrecked warships is ambiguous, meaning that enforcing the UK’s position in every jurisdiction could prove problematic. Relying on this principle to effectively protect

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<sup>112</sup> Dromgoole notes that for older wrecks, it may be difficult to determine whether they were used exclusively in public service. S Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press 2013) 156.

<sup>113</sup> The HMS *Swift*, a British wreck in Argentina, should serve as an example of the cooperation of States. See D Elkin, ‘HMS Swift: Scientific Research and Management of Underwater Cultural Heritage in Argentina’ in R Grenier, D Nutley, and I Cochran (eds) *Underwater cultural heritage at risk: Managing natural and human impacts* (UNESCO 2006) 76-8.

<sup>114</sup> For example, Art 73(1) UNCLOS.

wrecked warships leaves the UK dependent upon the cooperation of other States to apply it uniformly.

Sovereign immunity may also be redundant in protecting sunken vessels if they have been subsequently sold for scrap, as most States perceive that immunity is lost when title is abandoned.<sup>115</sup> Many military wrecks have already been sold by the UK, such as those lost in the Battle of Jutland.<sup>116</sup> Following calls to prevent the warships from being salvaged by a Dutch company,<sup>117</sup> the UK believed that as they had been sold for scrap following sinking, they were no longer sovereign immune and so there was little it could do to prevent interference.<sup>118</sup>

The UNESCO Convention will provide protection for wrecked warships in these circumstances, making its ratification a priority. State vessels and aircraft are defined in Article 1(8) as ‘warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of [UCH].’ It is notable that this definition makes reference to the ship’s ownership and/or usage *at the time of sinking*. This suggests that a ship’s status at the point of foundering is a determining factor in whether it is a ‘State vessel’ for the purposes of the Convention, and this is significant.

Unlike sovereign immunity, which States agree can be lost through abandonment, a vessel’s status at time of sinking is a fact in law that cannot be transferred or lost. Provided that a State is able to positively identify the remains of its State vessels and give assurance of its status as a non-commercially operated vessel, State interest would remain under the UNESCO Convention in spite of whether immunity has been lost.<sup>119</sup> Anyone seeking to direct activities at such wrecks would have to seek the flag State’s permission. This is also a much broader definition than the IDI Resolution, which requires usage *and* ownership of a vessel meaning ships under charter at the time of sinking may fall outside its provisions. If the vessel is not easily identifiable, the concept of a verifiable link in Article 7(3) discussed above would still ensure the potential flag State can remain involved.

As long as States are party to the Convention, sovereign immunity is not strictly required to prevent interference with sunken warships. Had the UK and the Netherlands been State parties, UK approval would have been required for any activities directed at the Jutland wrecks, which were on active duty when they sank. Additionally, as commercial exploitation is also excluded by the Convention, Dutch-flagged vessels salvaging for profit would also have breached its provisions.<sup>120</sup> Human remains must, too, be respected under Article 2(9) and Rule 5 of the Annex. The Convention provides a level of protection beyond what sovereign immunity can offer wrecked warships. This should be reason enough for the UK to reconsider its viewpoint on ratification.

As a major maritime State, the UK has a large number of State wrecks. Approximately 3500 date up to 1945, with 45% of those located in other

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<sup>115</sup> Federal Register (n 90).

<sup>116</sup> Over 6,000 British soldiers were killed in the battle off the coast of Norway, in addition to approximately 2,500 German soldiers. These wrecks came within the Convention’s scope in 2016.

<sup>117</sup> See generally, R Booth, ‘Battle of Jutland war graves ‘vandalised’ by illegal metal scavengers’ *The Guardian* (London, 18 September 2016), I McCartney, ‘The Battle of Jutland’s Heritage Under Threat: Commercial salvage on the shipwrecks as observed 2000 to 2016 (2017) 103(2) *The Mariner’s Mirror* 196.

<sup>118</sup> HL Deb 28 November 2012, vol 741, col 118.

<sup>119</sup> The wreck would also need to fall within the definition in Art 1(1) of the Convention.

<sup>120</sup> Arts 2(7) and 4, and Rule 2 Annex do not permit the operation of salvage law where the aim is commercial exploitation of the UCH.

jurisdictions.<sup>121</sup> Domestic laws are insufficient to protect these wrecks beyond the UK's maritime limits. Despite being able to designate wrecks as protected under the PMRA 1986 regardless of their location, the statute only applies to British passport holders and/or British flagged vessels. In 2014, the UK Department for Culture, Media and Sport and the Ministry of Defence published a guidance document on the treatment of historic military wreck sites outside UK territorial waters.<sup>122</sup> Although the document contains good guidelines for protection,<sup>123</sup> it does not contain binding legal provision and nor would foreign jurisdictions have to comply.

Reliance on sovereign immunity alone is insufficient in the absence of clear jurisprudence indicating customary international law status. Even with this confirmation, it is likely that immunity only applies where the flag State has not abandoned title. Where a wreck is no longer immune, it would generally be subject to the law of salvage. For example, when the UK became aware of the salvage of Jutland wrecks, HMS *Indefatigable* and HMS *Queen Mary* in 2010 and 2011 respectively, it was concluded that no further action could be taken.<sup>124</sup> It is clear that the only real way to safeguard such wrecks is through international agreement; the UNESCO Convention provides a way to do this without modifying law and State practice in relation to sovereign immunity. The UK's position should be reviewed as a matter of urgency.

Other States that initially held the same concerns about the Convention have seen that it does not modify sovereign immunity in practice, for example Spain, which ratified the treaty in 2005. Aznar-Gomez states that informal conversations have taken place with Mexico, Japan, Chile and the Philippines with regard the status of several Spanish sunken vessels in their respective territorial waters.<sup>125</sup> France, which also holds the view that sovereign immunity is retained,<sup>126</sup> ratified in 2013, and the Netherlands has been seriously considering ratifying the Convention.<sup>127</sup> Fears that the flag State will not be informed of discoveries are unfounded, and incidents of unauthorized intervention by other States are rare.

As analysed above, sovereign immunity for wrecked warships is not yet a fully established customary norm; certainly, this is true for those wrecks that fall within the domain of archaeological law. Coupled with the consideration that immunity no longer operates where State ownership has been abandoned, the principle may not be the most effective method to protect such wrecks. Enforcing it could be difficult or unfeasible in some circumstances. The Convention can protect wrecks where title has been lost as it defines a warship by its status at the time of sinking; thus, it avoids affording a theoretical basis for the extension of sovereign immunity. Far from diminishing the principle of immunity for wrecked warships, it strengthens protection and upholds State interests by safeguarding them beyond what can be achieved by relying on sovereign immunity alone. Given this, it does not modify any immunity that may already exist in international law and explicitly stipulates as much. The UK can continue its practice of regarding wrecked warships as immune, but its accession to the Convention would mean that any abandoned State wrecks would also be afforded protection as 'warships'.

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<sup>121</sup> Final Report (n 13), Royal Navy Loss List, Annex 2.

<sup>122</sup> DMCS and MOD Document (n 75).

<sup>123</sup> *ibid* 5.

<sup>124</sup> Warships: Wrecks: Written Question – 352, Commons (Asked 28 May 2015, Answered 1 June 2015). Presumably the Government believed it could not take action as the ships have been sold and immunity lost, see HL Deb 28 November 2012, vol 741, col 118.

<sup>125</sup> MJ Aznar-Gomez, 'Spain's position having ratified the UNESCO Convention', Burlington House Seminar 2010 (n 60) 41-2.

<sup>126</sup> Garaballo (n 30) 246, and Federal Register (n 90).

<sup>127</sup> Netherlands Ratification Announcement (n 38).

Given that many of these wrecks have already been irreparably damaged, and the illegal and unethical salvage of warships remains ongoing,<sup>128</sup> the UK Government should consider their protection an ‘immediate priority’<sup>129</sup> and reconsider its indefinite hiatus on reviewing the Convention.

### *C. Compatibility with UNCLOS*

Having examined the Convention’s definition and its treatment of wrecked warships, a third concern of the UK is that the Convention extends coastal State jurisdiction beyond the powers prescribed by UNCLOS, allowing for a creeping jurisdiction. The ghost of creeping jurisdiction haunted debates during the negotiations.<sup>130</sup> For some States the notification and reporting of UCH on the continental shelf was a natural consequence of protection, but others saw this as an infringement of international law, incompatible with UNCLOS.<sup>131</sup> This fear of a creeping coastal State jurisdiction was strengthened by the fact that some developing countries had previously advocated a 200nm jurisdictional zone over many activities and resources, leading to a suspicion that some States had jurisdictional ambitions extending beyond the protection of UCH.<sup>132</sup> In its explanation of vote, the UK stated,

[The introduction of] new elements of coastal State jurisdiction in respect of underwater cultural heritage located in the exclusive economic zone and on the continental shelf beyond 24 nautical miles from baselines ... [would not] be in full conformity with UNCLOS.<sup>133</sup>

Of concern are Articles 9(1)(b) and 10, particularly paragraphs 2 and 4. Together they contain a complex three-step procedure for reporting, consultation, and protective measures.<sup>134</sup> To the UK and other concerned States, these articles appear to bestow new jurisdictional powers upon coastal States in their EEZs and contiguous zones beyond what is conferred in UNCLOS. This section analyses both provisions to determine the accuracy of this interpretation.

#### *1. Article 9(1) UNESCO Convention*

The problem is the ‘constructive ambiguity’<sup>135</sup> adopted in Article 9(1)(b), a deliberate equivocation to try and accommodate varying views regarding jurisdictional powers of the coastal State. One issue that arises in relation to this provision is the use of the term ‘State Party’ in relation to rights and obligations under the Convention. It is unclear

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<sup>128</sup> See, for example, O. Holmes, M. Ulmanu, and S. Roberts, ‘The world’s biggest grave robbery: Asia’s disappearing WWII shipwrecks’ *The Guardian* (London, 3 November 2017). See also, Lamb (n 21).

<sup>129</sup> DCMS Statement (n 20).

<sup>130</sup> See generally Garabello (n 30) 138-54.

<sup>131</sup> *ibid* 144.

<sup>132</sup> Williams (n 8) 4.

<sup>133</sup> UK Explanation of Vote (n 33).

<sup>134</sup> UNESCO doc WG1-NP3, 6 July 2000.

<sup>135</sup> See the Netherlands’ and Japan’s Remarks Prior to Vote during Debates in Commission IV on Culture (29 October 2001, 31<sup>st</sup> Session of the General Conference, UNESCO), reproduced in Garabello (n 30) 243-5. Japan sees the ambiguity as the ‘good facilitator’ to reconcile some conflicting views.

whether these rights attach to the coastal State in whose waters the vessel is located, or to the flag State of the vessel.

- (a) a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at [UCH] located in its [EEZ] or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;
- (b) in the [EEZ] or on the continental shelf of another State Party:
  - (i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party;
  - (ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.

This lack of clarification is a concern for many States. If the flag State has this power, then the Article does nothing more than give effect to the existing right of flag States to have their own nationals and vessels report to them – this is based on the active personality principle in international law, and arises from principles of nationality rather than territory. However, if ‘State Party’ could be interpreted as the coastal State, Article 9 would give coastal States the power to require notification of discoveries or activities directed at UCH in their contiguous zone or EEZ. This would be a new competence awarded outside of the UNCLOS framework,<sup>136</sup> which many States find unacceptable. The deliberate ambiguity used to move forward with the Convention, despite a lack of consensus on the issue, has been a block for several major maritime States.<sup>137</sup> The UK was unwilling to ratify in the absence of a clear interpretation.

Articles 31-33 VCLT<sup>138</sup> can be used as a means of interpreting treaties where provisions are unclear. Article 31(1) provides that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ In order to provide context, the text and any subsequent practice in the application of the treaty can be considered.<sup>139</sup> If a plain reading of the text of Article 9 is made, it simply outlines the duty of the flag State to ensure its vessels report any discoveries or activities. The *chapeau* of the article seems to confirm this.<sup>140</sup>

Paragraph 1(a) refers to a State’s national, vessel and maritime zones, meaning that the State party mentioned here is both the flag State *and* the coastal State. Paragraph 1(b) refers to *another State party’s* maritime zones, i.e. not those of the flag State. Presumably then, ‘*that other State Party*’<sup>141</sup> also refers to the same State, that is, the coastal State. Given that the coastal State is the *other* State party, then the obligation to require reporting as set down in the provision must be read as falling on the flag State.<sup>142</sup>

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<sup>136</sup> Arts 56 and 77 UNCLOS set out the limited sovereign rights and jurisdiction of the coastal State over the EEZ and continental shelf.

<sup>137</sup> For example, the UK, Norway, Russia, and the USA. See Garabello (n 30) 248-52.

<sup>138</sup> Vienna Convention (n 111).

<sup>139</sup> *ibid*, Art 31(3)(b).

<sup>140</sup> ‘Reporting and notification in the exclusive economic zone and on the continental shelf’.

<sup>141</sup> Emphasis added.

<sup>142</sup> Scovazzi believes this to be a true reflection, T Scovazzi, ‘Convention on the Protection of Underwater Cultural Heritage’ (2002) 32 Environmental Policy and Law 152, 154. Forrest also appears to take this view, stating that a ship can either report to the flag State and coastal State, or just the flag State, which will undertake to inform the coastal State; Forrest (n 89) 348.

‘Subsequent practice’ also provides context for interpreting a treaty, and is defined by the ILC as ‘conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.’<sup>143</sup> Article 31(3)(b) VCLT and the ILC both indicate that there must be collective agreement as to how a provision should be interpreted. This would be difficult to apply here, as no subsequent practice has yet emerged; certainly, no collective practice exists. Only one report of a wreck has been made to UNESCO, and as such there is no practice to aid in the interpretation of Article 9(1)(b).<sup>144</sup> However, a draft of the Operational Guidelines prepared by the Secretariat in 2009 attempted to provide some clarification on Article 9(1):<sup>145</sup>

‘When the concerned heritage is located in the EEZ or on the continental shelf of another State Party the State Party requires such reports to be sent  
(a) either to it and to the other (Coastal) State Party; or  
(b) only to it. In this case it ensures the rapid and effective transmission of such reports to all other States Parties.’<sup>146</sup>

Nevertheless, the sentiment amongst States was that the above paragraphs did not exactly reflect Article 9(1)(b),<sup>147</sup> and that the guidelines should not try and rewrite or interpret the treaty.<sup>148</sup> It was completely altered for the eventually adopted Operational Guidelines to remove any explanation of the provision.<sup>149</sup>

Finally, the context for interpretation can include any relevant rules of international law applicable in the relations between the parties.<sup>150</sup> It seems logical that States would opt for an interpretation that is consistent with UNCLOS, which the majority of State parties have ratified. UNCLOS allows for ‘other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.’<sup>151</sup> This could be understood as also covering the UNESCO Convention. In the same vein, the UNESCO Convention itself provides that the treaty is not incompatible with UNCLOS,<sup>152</sup> and so with this in consideration, Article 9 must be interpreted in such a way that is not irreconcilable with UNCLOS. Article 311 UNCLOS provides a special procedure for the conclusion of agreements modifying or suspending the operation of UNCLOS provisions.<sup>153</sup> As this procedure was not strictly followed during

<sup>143</sup> International Law Commission, *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Draft Conclusion 4(2), adopted by the Commission at its 65<sup>th</sup> Session, 2013, UN Doc. A/CN.4/L.813 (2013).

<sup>144</sup> The report was made by Italy, concerning a wreck off the coast of La Spezia, UCH/15/5.MSP/220/2, 18 June 2013, 3. Other reports have been returned to the authorities concerned as the wrecks in question were in territorial waters, rather than international waters.

<sup>145</sup> UNESCO Meeting of State Parties to the Convention on the Protection of the Underwater Cultural Heritage, ‘Draft Operational Guidelines’ (20 October 2009) UCH/09/2.MSP/220/5 REV.

<sup>146</sup> *ibid* 15-16.

<sup>147</sup> See comments by Saint Lucia, Working Group on the Operational Guidelines, Revised Draft of the Operational Guidelines (7 February 2011), UCH/11/WG/220/1 REV, 11.

<sup>148</sup> Summary Record of the Second Session of the Meeting of State Parties to the Convention on the Protection of the Underwater Cultural Heritage (11 January 2010), UCH/11/3.MSP/220/4rev, 8, 16. This is reflected in the final Operational Guidelines (n 41) para 22.

<sup>149</sup> Operational Guidelines (n 41) 8.

<sup>150</sup> Vienna Convention (n 111) Art 31(3)(c).

<sup>151</sup> Art 303(4).

<sup>152</sup> Art 3.

<sup>153</sup> The Netherlands Advisory Committee on Issues of Public International Law, ‘Advisory Report on the UNESCO Convention on the Protection of the Underwater Cultural Heritage’ (Translation) (The Hague, December 2011) Advisory Report No. 21, 6.

the UNESCO Convention negotiations, it must be deduced that all States involved did not consider the Convention to modify or suspend the operation of any UNCLOS provisions.<sup>154</sup>

In order to confirm the meaning resulting from the application of Article 31, supplementary means of interpretation, including the preparatory work of the treaty, may be consulted.<sup>155</sup> An Advisory Report prepared by the Netherlands in considering ratifying the treaty maintains that the ambiguity starts in the negotiations, therefore there is no point consulting the preparatory works.<sup>156</sup> However, it is somewhat useful to know the origins of Article 9 in the *travaux préparatoires*.<sup>157</sup>

The proposal for the wording of Article 9 was put forward by the USA. The idea was that a State could decide either for simultaneous notification to the flag State and coastal State, or alternatively, only to the flag State, which would then ensure transmission of the report to other State parties.<sup>158</sup> However, the wording was ambiguous, leaving the provision open to a number of interpretations. The interpretation allowing creeping jurisdiction was swiftly rejected by the authors,<sup>159</sup> but a number of other States welcomed the opportunity for a constructive ambiguity.<sup>160</sup>

A last-minute proposal by the UK, France and Russia attempted to remove the ambiguity by clarifying Article 9(1)(b) and proposing two amendments to the text.<sup>161</sup> This clarified that it is the flag State which has the right to require reporting, for instance, the amendment to sub-paragraph (ii) provided ‘a State Party shall require *its* national or master of *a vessel flying its flag* to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other State Parties.’ The USA supported this move, stating that ‘Article 9(1)(b)(ii) can only be read as an obligation on flag States in regard to its own nationals and flag vessels.’<sup>162</sup> Despite being defeated by a large majority, Garabello states that ‘the interpretation emerging from [the proposed amendment] is to be preferred for Art. 9, para. 1 (b) (ii), *in conformity with the preparatory works*.’<sup>163</sup> Although the ambiguity in the provision does indeed extend from the *travaux préparatoires*, the intention of the authors of the draft provision was that ‘State Party’ should be read as ‘flag State’, not ‘coastal State’.<sup>164</sup>

The ILC states that the supplementary means referred to in Article 32 also include ‘conduct by one or more of the parties in the application of the treaty after its

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<sup>154</sup> *ibid.* Norway expressly reserved its position under Art 311(3) during the general debate in Commission IV of the 31<sup>st</sup> General Conference of UNESCO, expressly reserving its position relating to international agreements modifying or suspending the operation of provisions under UNCLOS. See M Rau, ‘The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea’ (2002) Max Planck 6 UNYB 387, 392, 423. In any case, Rau suggests that the application of Art 311 is not pertinent as Art 311(5) does not affect international agreements expressly permitted by other articles of UNCLOS. This has the effect of precluding any argument of possible inconsistency between the *lex generalis* of Art 311 and the *lex specialis* of other relevant articles of UNCLOS; Rau, 423.

<sup>155</sup> Vienna Convention (n 111) Art 32.

<sup>156</sup> Netherlands Advisory Report (n 153) 3.

<sup>157</sup> Garabello (n 30) contains a detailed record of negotiations.

<sup>158</sup> *ibid.* 144.

<sup>159</sup> Including Germany, Norway, the Netherlands and France.

<sup>160</sup> Garabello (n 30) 144.

<sup>161</sup> UNESCO doc. 31 C/COM.IV/DR.5, 26 October 2001.

<sup>162</sup> Garabello (n 30) 144.

<sup>163</sup> *ibid.* 145. See also Scovazzi (n 142) 154, cf PJ O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (2<sup>nd</sup> ed, Institute of Art and Law 2014) 83. O’Keefe states that the rejection of this proposal is a ‘clear indication’ that most States preferred to retain both interpretations of the provision.

<sup>164</sup> *ibid.* Emphasis added.

conclusion.’<sup>165</sup> Although State practice is severely limited, a number of State parties have issued declarations under Article 9(2) regarding the manner in which reports will be transmitted under Article 9(1)(b).<sup>166</sup> Algeria, Cuba, Mexico, Saudi Arabia and Ukraine all require reporting to the flag State in the first instance, subsequently transmitting the information to other States by various means. Argentina, Italy and Portugal have all declared that they will report in accordance with Article 9(1)(b)(ii), and although they do not clarify which State party a vessel should report to, it is difficult to foresee a situation in which the coastal State is notified but the flag State is not. Whilst these States prefer to retain the flexibility of an ambiguous provision, no party has expressly declared that it will require reporting to the coastal State, either solely, or simultaneously with the flag State under Article 9(1)(b)(i). The Dutch Advisory Report considers it unlikely that a State party will impose a duty to notify coastal States given the different interpretations by States.<sup>167</sup>

The conclusion that emerges from the application of Articles 31 and 32 VCLT suggests an implicit understanding that only the flag State that can require notification. Nevertheless, the *travaux préparatoires* indicates that the constructive ambiguity in Article 9 was clearly intentional and was not intended to have a strict interpretation. In the absence of consistent and collective subsequent practice, potential State parties will not be able to confirm an exact interpretation, yet this should not impede them from ratifying. Most States are party to UNCLOS, Article 303(2) which also has a jurisdictional constructive ambiguity; this is not seen as a problem. The ambiguity in Article 9 should be seen as a flexibility, allowing States with a range of views on jurisdictional powers to ratify. States can make their individual approach clear by entering a declaration under Article 9(2) upon signature or ratification, making a choice where their report will be sent to. The UK could ratify the Convention, declaring that reports will be submitted to the flag State in the first instance.

Declarations exist exactly for this concern and purpose; to clarify the State’s position on the understanding or interpretation of a provision, without excluding or modifying the treaty’s legal effect. The UK has utilised declarations to clarify its understanding of jurisdictional issues when ratifying other agreements, for example, the UN Straddling Fish Stocks Agreement.<sup>168</sup> If the UK does make a declaration on the UNESCO Convention, it would simply be acting in accordance with its past conventional activity. It is therefore difficult to see why the UK cannot take similar action with this treaty, and it should not pose an obstacle to reviewing its position on the Convention.

## 2. Article 10(2) UNESCO Convention

Because of its nature, UCH is often irreversibly entwined with natural resources on the seabed. Most shipwrecks, particularly ones which fall under the Convention’s 100 year criteria, have transformed into habitats for various species after many years underwater.

<sup>165</sup> ILC (n 143) Draft Conclusion 4(3).

<sup>166</sup> <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/declarations-and-reservations/>.

<sup>167</sup> Netherlands Advisory Report (n 153) 8.

<sup>168</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3. This declaration notes the UK’s understanding that no new grounds for jurisdiction are provided based on the nationality of persons involved in fishing on the high seas, rather than on the principle of flag State jurisdiction.



Article 10(2) is understood to be an explicit recognition of that link.<sup>169</sup> It reaffirms that a State can exercise its sovereign rights to prevent interference with its natural resources, and implicitly suggests that in doing so, could use this as a mechanism to protect UCH.<sup>170</sup> This ‘innovative’ right afforded to the coastal State to prohibit or authorize activities directed at UCH is in no way granted under UNCLOS,<sup>171</sup> suggesting another jurisdictional creep:

A State Party in whose [EEZ] or on whose continental shelf [UCH] is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including [UNCLOS].

In practice, the provision merely has a declaratory nature. It only permits States to prohibit or authorize activities directed at UCH to prevent interference with its sovereign rights or jurisdiction *provided for by international law, including UNCLOS*.<sup>172</sup> Article 56 UNCLOS sets out the coastal State’s sovereign rights and jurisdiction in the EEZ, and under Article 58(3), it has the right to adopt laws and regulations in accordance with UNCLOS to safeguard those rights. Article 77 sets out sovereign rights over the continental shelf and provides that coastal States can authorize and prohibit activities of other States in relation to these rights. Article 10(2) merely gives effect to a right already created by UNCLOS. O’Keefe states that ‘even if such prohibition or regulation has the incidental effect of protecting [UCH], there is no issue of ‘creeping jurisdiction’ or contravention of the provisions of UNCLOS.’<sup>173</sup>

It has been questioned whether the wording ‘to prevent interference’ in paragraph 2 implies that measures can be taken against activities which *may* interfere with sovereign rights, not simply ones that *do*. This would give States broad discretion to take measures against a number of activities that may or may not interfere with their sovereign rights. The Netherlands in particular had disagreed with the phrase ‘prevent interference’ during negotiations, favoring ‘will interfere’.<sup>174</sup> However, the norm cannot be used to provide extensive protection to UCH.<sup>175</sup> The right is limited to the prevention of interference with the coastal State’s sovereign rights or jurisdiction. The actions of a coastal State making excessive use of its rights under Article 10(2) to provide *extensive* protection to UCH could, in principal, be challenged before a court or tribunal.<sup>176</sup> Recourse to dispute resolution under Article 25 of the Convention is available for State parties.

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<sup>169</sup> See for example, O’Keefe (n 163) 90, Dromgoole (n 112) 290.

<sup>170</sup> cf Scovazzi (n 142) 155.

<sup>171</sup> G Carducci, ‘New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage’ (2002) 96 AJIL 419, 430.

<sup>172</sup> This provision in itself has also been controversial, as it suggests that there are jurisdictional rights beyond those conferred by UNCLOS. The same relates to Art 3, where a similar formula is used. See Dromgoole (n 112) 301.

<sup>173</sup> O’Keefe (n 163) 69.

<sup>174</sup> Garabello (n 30) 148.

<sup>175</sup> Rau (n 154) 416, cf O’Keefe (n 163) 69.

<sup>176</sup> Rau (n 154) 427, emphasis added. O’Keefe considers it unlikely that a State would challenge the measures taken by another to protect its sovereign rights, asserting that it ‘would be necessary for the other State to prove its allegations – not only the practical aspects but also something approaching misconduct on the part of the coastal State’; O’Keefe (n 163).

### 3. Article 10(4) UNESCO Convention

Article 10(4) was an equally thorny point during negotiations in terms of coastal State jurisdiction, despite being the ‘cornerstone’ of the Convention.<sup>177</sup> As with the previous two provisions above, the argument centres around the latitude given to coastal States. Some States considered that any special role attributed to the coastal State would run counter to UNCLOS.<sup>178</sup> As a result, the term ‘coastal State’ is not used anywhere in the Convention, rather the text refers to a ‘Coordinating State’. Considerable apprehension remains over such a concept, which is seen as a whitewashing of additional coastal State jurisdictional competences in the EEZ and continental shelf. Subsequently, States such as the UK have a number of concerns about the role of the coastal State and the scope of practicable measures it could unilaterally take. The provision, *prima facie*, allows the coastal State to act prior to consultation with other interested States, taking limitless measures in doing so:<sup>179</sup>

Without prejudice to the duty of all States Parties to protect [UCH] by way of all practicable measures taken in accordance with international law to prevent immediate danger to the [UCH], including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the [UCH], whether arising from human activities or any other cause, including looting...

Paragraph 4 must be read in the context of the entire article. Concerning the granting of more powers to the coastal State, Article 10(3)(b) provides that the coastal State does not necessarily have to be the Coordinating State. There is a choice for another State to coordinate consultations if the coastal State cannot do so.<sup>180</sup> This means that any perceived extension of jurisdiction cannot be attributed to the coastal State. This is confirmed by Article 10(6), stating that any action taken cannot constitute a basis for any jurisdictional rights not provided for in international law, including UNCLOS. There is also a clear difference in the language in this provision and in paragraph 2 above, which specifically discusses the *coastal State* taking measures to protect interference with its *own* rights.

Having the coastal State be the default Coordinating State makes sense. Geographically it is the closest, and already has rights and jurisdictions in the area over other things.<sup>181</sup> Scovazzi recognizes that it would have been illusory to grant this right to the flag State, considering the risk of activities carried out by flags of convenience.<sup>182</sup> The coastal State’s role is simply the coordinator, and this certainly does not prevent the flag State from taking action with its own vessels to prevent immediate danger to UCH in the EEZ or continental shelf of another State party.<sup>183</sup> In practice, the

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<sup>177</sup> Scovazzi (n 142) 155.

<sup>178</sup> Garabello (n 30) 149. The UK, Norway and the USA also held this view.

<sup>179</sup> Dromgoole identifies a third issue, that the wording appears to permit measures to be taken in respect of all types of human activities, including those only incidentally affecting UCH; Dromgoole (n 112) 300.

<sup>180</sup> O’Keefe (n 163) 68. For example, if the coastal State lacks an administrative structure to handle the work involved; it does not have the requisite technology for the task; or the UCH in question has no particular relationship to its own people.

<sup>181</sup> *ibid* 81.

<sup>182</sup> Scovazzi (n 142) 155.

<sup>183</sup> Rau (n 154) 417.

designation of a default Coordinating State allows protective measures to move fairly quickly, without having to negotiate who the Coordinating State is in the first instance.

Article 10(3) places an emphasis on consultation with other interested State parties,<sup>184</sup> with Article 10(6) providing that the Coordinating State must act on behalf of the State parties as a whole and not in its own interest.<sup>185</sup> All interested State parties must be consulted in relation to the protection of UCH unless there is immediate danger, and even then, it must be for the benefit of all States. This provides that the scope of practicable measures to be taken cannot be unlimited. The authorization of any activity under paragraph 4 would also have to conform to the Rules in the Convention's Annex.

Although the UK and the USA strongly disagreed on paragraph 4, as it allowed the coastal State to take unilateral action,<sup>186</sup> it is sensible to have an urgent measures procedure in place to enable States to adequately protect vessels in immediate danger. There must be some enforcement mechanism in the Convention or it would be somewhat of a paper tiger. Negotiations have the capacity to be lengthy and time consuming,<sup>187</sup> and there is a danger of losing the UCH if efficient action is not taken. For example, if a State happens across a foreign vessel looting UCH, it cannot afford to take time to consult other States; it must act quickly. Considering the adamant inclusion of 'looting' in the provision,<sup>188</sup> it is clear that these are the kinds of activities envisaged to fall within the scope of this paragraph. This is also pursuant to the general duty to protect UCH in Article 303(1) UNCLOS.

Although the text of Article 10 is clumsy, it does not extend any new competences to the coastal State. Dromgoole believes that Article 59 UNCLOS could help bolster the legitimacy of the Coordinating State role.<sup>189</sup> Article 59 provides for the resolution of disputes where UNCLOS does not attribute rights or jurisdiction to the coastal State in the EEZ and a conflict of interest arises between States. As such disputes must be resolved on the basis of equity and in the interest of the international community as a whole, the Coordinating State 'acts on behalf of interested States [and] strengthens the argument that the interests of the coastal State and those of the international community are fundamentally one and the same.'<sup>190</sup>

Incompatibility with UNCLOS has been a significant stumbling block for State ratification, illustrated by the controversial Articles 9 and 10. The French ratification is significant in this respect. It had also been opposed to any expression of creeping jurisdiction that intended to modify the framework set out in UNCLOS.<sup>191</sup> It favoured an ad hoc approach of establishing bilateral and multilateral treaties to serve the interests of UCH on the continental shelf and on the EEZ, rather than this extension of the coastal State's jurisdiction.<sup>192</sup> The Netherlands' perspective is also useful, given that it, too, initially felt that the Convention afforded extra competences to the coastal State.

The Dutch Advisory Report states that Article 10 simply gives more substance to protect UCH on the EEZ and continental shelf through cooperation, and that the system

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<sup>184</sup> This 'strangely placed' provision is laid down in Art 9(5), O'Keefe (n 163) 86. This declaration of an interest in consultation should be based on a verifiable link.

<sup>185</sup> This is confirmed in the *travaux préparatoires*, UNESCO doc WG.1/NP.1, 5 July 2000.

<sup>186</sup> Garabello (n 30) 151.

<sup>187</sup> Scovazzi (n 142) 155, 'By definition, in a case of urgency a determined State must be entitled to take immediate measures without losing time in any procedural requirements.'

<sup>188</sup> Garabello (n 30) 149.

<sup>189</sup> Dromgoole (n 112) 302.

<sup>190</sup> *ibid* 303.

<sup>191</sup> Le Gurun (n 92) 78.

<sup>192</sup> *ibid* 85.

in Article 10(6) sufficiently safeguards against abuse of the provision. The Netherlands feels that Article 10 could be regarded as implementing Article 303(1),<sup>193</sup> and the State is currently working to ratify the Convention. This change in States' attitudes towards the Convention should serve as a workable example for the UK and other States with similar concerns, whilst also explicitly evidencing that these States have made underwater heritage a priority.

#### IV. CONCLUDING REMARKS

Upon finalizing the text of the Convention, the UK declared that it could not ratify the Agreement as it viewed some significant issues to be insurmountable. This paper has illustrated that these perceived problems with the Convention should no longer be considered a barrier to accession. The UK has misinterpreted the Convention's purpose, believing that the treaty contains a very broad definition of UCH. Although several administrative and policy changes may be necessary to adequately monitor some activities falling within the Convention's scope, it certainly does not require designation of all UCH in the territorial sea. On the point of sovereign immunity, although customary status of the rule is likely, it is not confirmed and so cannot be unquestionably relied upon to protect wrecked warships; and, relatedly, immunity may not be effective in protecting UCH where State ownership has been abandoned in any case. Notwithstanding the fact that the Convention does not alter any immunities from those which may already exist, it does offer protection beyond that of immunity for wrecked warships where title has been lost or transferred.

Finally, in spite of the fact that some provisions appear to create new competencies for coastal States, no evidence of this exists in practice. Certainly, this author takes the view that the Convention is reconcilable with UNCLOS. States could take a narrower approach to these provisions, entering a declaration to that effect upon accession and ensuring that their favoured interpretation is adopted through consistent practice. State parties have a valuable opportunity to contribute to the Convention's practice that, evidently, non-parties do not possess. Given many States' reserved positions on these jurisdictional clauses, it is likely that a more conservative approach will be taken in practice in any case. Although this ability to shape the interpretation of the text would be a particularly useful tool for provisions where the UK has previously held objections, the Convention does not depart from the UNCLOS jurisdictional regime as discussed throughout this paper.<sup>194</sup>

Having shown in this article that the UK's key objections are either unfounded or surmountable, ratification of the Convention would seem to be a logical progression. Although not a perfect Convention by any means, reflected by the difficult negotiations and clunky text, it is certainly a significant step forward as regards UCH protection. The treaty's fairly flexible provisions allow States to form management processes in accordance with their individual positions, and given the UK's former concerns, its membership could provide new impetus for other States to reconsider the Convention.

The success of the UNESCO Convention depends upon its players. At the time of adopting the text in 2001, some notable flag States considered that the preservation of the UNCLOS status quo outweighed the benefits of the preservation of UCH. In the resulting fifteen years, States have progressively moved to protect UCH in the wake of

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<sup>193</sup> Netherlands Advisory Report (n 153) 10.

<sup>194</sup> The UK's ratification, alongside the likely accession of the Netherlands, would serve as confirmation of this.

destruction of such objects, and appreciation of the issues has grown since the UK's legal team initially considered the Convention. Against this background, the DCMS' announcement that the review of the Government's position on ratification has been postponed indefinitely<sup>195</sup> is a monumental retrograde step. Whilst this paper demonstrates that the legal issues can be overcome; for the UK, the political will to ratify will be the key hurdle.<sup>196</sup> Given that the UK's departure from the European Union is on the horizon, much of the Government's resources will be focused on this new challenge. This focus should not come at the expense of our heritage.

With overwhelming national interest in the two world wars especially, the protection of UCH remains a priority. Having already reached the centenary of WWI, a significant number of wrecks worldwide are now falling within the scope of the Convention. As argued in this paper, domestic law and a reliance on sovereign immunity offer insufficient protection for safeguarding these wrecks, making exploitation of these sites a very serious prospect. WWII shipwrecks are already disappearing at the hands of salvage divers,<sup>197</sup> meaning timely reconsideration of the Convention is crucial. The loss of our underwater heritage, much of it carrying the remains of soldiers lost in combat, should be a priority for the Government.

UCH is not a renewable resource. Once it is disturbed or recovered, the archaeological knowledge that it can provide may be lost forever. Artefacts can be damaged, and important contextual information destroyed.<sup>198</sup> If efforts are not made to preserve this knowledge, the only winners are the looters. One of Steinbeck's characters asked, 'how will we know it's us without our past?'<sup>199</sup> Unless States such as the UK make the protection of underwater heritage a priority, we may never truly know.

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<sup>195</sup> DCMS Statement (n 20).

<sup>196</sup> The Impact Report referred to in the introduction of this paper discusses the necessary administrative and policy changes, and the majority of the substantive clauses of the Convention present no difficulty to the UK. See Final Report (n 12) 71, 83.

<sup>197</sup> See, for example, Holmes, Ulmanu and Roberts (n 128).

<sup>198</sup> Recording the particular location of the artefacts and their proximity to other artefacts and the ship's hull are significant in preserving the entire time capsule, as this location information could be important for revealing history and culture. See, O Varmer, 'The Case Against the "Salvage" of the Cultural Heritage' (1999) 30(2) JMLC 279, 289.

<sup>199</sup> J Steinbeck, *The Grapes of Wrath* (Penguin Classics 2000) 111.